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Via Email: R.Abma@minfin.nl

The Secretary of the Corporate Governance Committee
c/o PO Box 20201
2500 EE The Hague
The Netherlands

Comments on Proposed Dutch Corporate Governance Code

Ladies and Gentlemen:

We are a global law firm that has regularly worked with Dutch companies for many years. We have worked with large-cap Dutch domestic companies with Euronext Amsterdam stock exchange listings, multinational groups with parent companies incorporated in The Netherlands but whose stock exchange listings are elsewhere in Europe and the United States, and earlier stage companies both before and after their stock exchange listings. We have reviewed the proposed Dutch Corporate Governance Code dated 1 July 2003 (the "Code") and respectfully submit these comments in advance of the 5 September 2003 deadline.

We commend the Corporate Governance Committee on the thoughtfulness and objectives underlying the proposed Governance Code. We support the substantial majority of the best practices articulated in the current proposal. Our comments are designed to suggest potential improvements and, in particular, to address the concerns of Dutch multinational companies with stock exchange listings outside The Netherlands who have a strong commitment to corporate governance but who may be subject to different governance standards and practices than those that may be applicable to Dutch companies solely with domestic stock exchange listings.

As a preliminary matter, we note that the Code was dated only 1 July 2003, and that some of our clients have only learned of it very recently and have not had the opportunity to fully assess its impact on their Supervisory Boards, Management Boards, other management functions or shareholders. We are concerned that the comment period, which expires today, will not have been long enough for companies with multiple listings to review the Code, compare the Code's best practice proposals with the best practices in the countries in which they are listed, and make meaningful comments on the proposals articulated in the Code. We therefore believe that it would be very beneficial to provide additional time to comment before a final Code is promulgated. In addition, we believe that a longer implementation period before the Code becomes effective would be extremely helpful for companies whose stock exchange listings and principal operations are outside The Netherlands to assess what internal corporate governance changes are appropriate in response to the Code's recommendations.

Our international clients have often chosen to set up holding companies in The Netherlands because of the flexibility offered by Dutch company laws and the network of international tax treaties applicable with The Netherlands. The Committee may want to take into account the risk that the bureaucratic requirements imposed on companies as a result of the implementation of the Code, if they are not well understood or easy to apply, may in the future dissuade companies from setting up new holding companies in The Netherlands despite their commitment to the principles of good corporate governance.

Our main concern in reviewing the Code stems from the lack of distinction between Dutch companies with primary listings in The Netherlands and multinational companies incorporated in The Netherlands but without a listing on Euronext Amsterdam. We believe that the Code should make explicit reference to the differences between these types of companies. In the case of Dutch companies listed outside The Netherlands, we recommend that the company have the option to elect to measure its compliance by reference to either the applicable Code and best practices in The Netherlands, as its jurisdiction of incorporation, or in the country where it maintains its stock exchange listing. We believe this elective feature is critical so that Dutch companies with listings outside The Netherlands will not be subject to multiple and potentially conflicting regulation.

In addition, we are concerned that the Code implicitly suggests that non-compliance with specific best practices falls short of good corporate behavior notwithstanding its "comply or explain" approach. In certain instances, wording suggests that non-compliance would be construed as inappropriate corporate behavior even though the prescribed best practices may not necessarily be consistent with significant market practice elsewhere. Appendix A of this letter sets forth some specific examples of such Code provisions along with our initial comments on the recommended best practices based on our own experience. We note, in particular, the recommended bar on selling securities until Management Board members leave the company; the recommended bar on any control of personal equity investments, the unusually strict Supervisory Board independence standards and the maximum variable compensation limit of 50% of total compensation as examples where reasonable minds would not necessarily agree that the recommended practices are always in the best interests of the companies or their shareholders. A greater recognition of these differences in practices could remove potential perceived disincentives for multinationals or new companies to organize themselves under Dutch law.

In today's sensitive market environment, disclosure of even technical non-compliance with Dutch best practices as articulated in the Code, even though a multinational without a Dutch listing may fully comply with applicable laws, rules and regulations and best practices in such company's principal trading markets, could be misinterpreted by the press or investors to suggest defective corporate governance and failure to comply with appropriate corporate norms. We believe that the flexibility provided by the comply or explain approach is helpful only to the extent investors, analysts and others fully understand that the Code does not purport to be an exclusive guide for best practices. It would therefore be helpful if the Code itself explicitly stated that other practices can constitute good corporate governance, particularly for multinationals incorporated in The Netherlands but with primary listings elsewhere.

Moreover, we strongly recommend that the Code clearly and expressly authorize multinational companies with parent companies incorporated in The Netherlands but no Dutch listing to achieve full compliance under the Code provided they explain their practices by reference to the corporate governance standards and practices in the countries in which they are listed.

The process of conceptualizing and implementing important and effective corporate governance reforms has proven to be difficult and contentious, and has generated a great deal of debate within the United States, in Europe and elsewhere around the world. We understand the European Commission in May has rejected the approach of requiring a single European corporate governance code, in favor of national codes, and that the Commission intends to assist in coordinating these various approaches in different countries. We respectfully submit that mandating compliance with Dutch "best practices" for companies with their listings outside The Netherlands would appear to conflict with the Commission's approach. As you consider the Code and assess the possible best practices, we believe greater recognition of the differences in these practices in different markets and the importance of The Netherlands as an international corporate environment may cause the Code to be well received and not viewed as detrimental to Dutch companies with a multinational scope.

We hope the Committee will give due consideration to the above comments. In so doing, the Committee would help international firms like ourselves reconcile potentially conflicting practices in different markets and thereby better communicate the exact nature and implications of the Code requirements and similar regulations in other countries to our clients. If the Committee would like to discuss any of these issues further, we would welcome the opportunity to do so at your convenience. Please do not hesitate to contact me in San Francisco (tel: +1-415-616-1215; email: jwilson@shearman.com), or Linda A. Hesse in Paris (tel: +33 1 53 89 70 99; email: lhesse@shearman.com).

Very truly yours,

John D. Wilson

cc: Linda A. Hesse
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<u>Appendix A</u>

<u>Dutch Corporate Governance Code provision</u>	**<u>Comment</u>**
Supervisory Board independence	
II.5.1 "*All members* of the Supervisory Board, with the exception of *not more than one person*, shall be independent in the sense that the definition of a lack of independence referred to in best practice provision II.5.2 are not applicable to them."	The recommended limitation on the Supervisory Board to have no more than one non-independent director, particularly given the very strict and broad definition applied in evaluating whether a Supervisory Board director is independent, may not be representative of best practices elsewhere and may in some cases be counterproductive. The Dutch Code's strict standard for independence and near-unanimous independent Supervisory Board structure stands in contrast to the NYSE's proposal, which would require a company to constitute a majority of its Supervisory Board with persons falling within its definition of "independence". Furthermore, the NYSE's criteria for independence would allow the Supervisory Board to make a determination in its business judgment whether a particular relationship is material enough to impair an individual member's independence, given the facts and circumstances of the particular situation.
II.5.2 introductory paragraph Definition of "family member" applies to blood or marriage relationships *up to the second-degree*.	We respectfully submit that the inclusion of second-degree family members may be over-broad. We note the NYSE's definition of family member, which is limited to the concept of "immediate family member", and which includes *first-degree* family members or others who share such person's home. We believe the NYSE's definition of "family member" captures meaningful relationships that could impair independence, while the Code definition in II.5.2 could capture many relationships that are not material.
II.5.2(a) Independence impaired for directors who, including their second-degree family members, served as an employee or member of the management board of the company (including associated companies as referred to in section 1 of the Disclosure of Major Holdings in Listed Companies Act (WMZ) 1996)	Independence could be technically impaired in highly attenuated and immaterial situations. We note that the NYSE proposals were revised in April 2003 to avoid impairing director independence in such situations, but rather provided for non-independence when employment was found by the director at such company, employment was found by immediate family members for more than $100,000, or employment was found by directors or immediate family members *as executive officers* in other companies (i) that account for at least 2% or $1 million, whichever is greater, of such company's consolidated gross revenues, or (ii) for which the company accounts for at least 2% or $1 million, whichever is greater, of such other company's consolidated gross revenues.

Dutch Corporate Governance Code provision	**Comment**
II.5.2 (e) Persons who “hold at least 10 percent of the shares in the company (including the shares held by natural persons or legal entities which cooperate with him under a legal, tacit, oral or written agreement)” are disqualified from independence.	II.5.2 (e) impairs the independence, and correspondingly discourages Supervisory Board membership, of significant shareholders. We understand this provision is intended to discourage significant shareholders from actively managing their investments by serving on Supervisory Boards or designating others on the Supervisory Board. We believe that disqualifying significant shareholders with in-depth industry knowledge, years of experience, and a vested interest in a company’s long-term success does not necessarily represent best practice in corporate governance. Indeed, the NYSE made this point in its corporate governance proposals, explicitly stating that ownership of even a significant amount of stock, by itself, is not a bar to an independence finding. We believe that if the Code is implemented as proposed, it could have the unintended consequence of discouraging shareholder participation in the long-term success of Dutch companies through representation on the Supervisory Board. We note that Dutch corporate law and its principles of fiduciary duty require that every director act solely in the best interests of the company. We do not see why it follows that it is a best practice to discourage shareholder involvement in the Supervisory Board under applicable Dutch legal principles.
Prohibitions on Supervisory Board equity investments and remuneration	
II.7.1 Prohibition on share or option compensation or ownership in company shares	We believe that best practice provision II.7.1 may go significantly beyond international norms of corporate governance. We do not believe that corporate governance and shareholder value are necessarily well served by strict prohibitions on the use of shares or options to compensate Supervisory Board directors or ownership of shares or options at the time of appointment. While we agree that Supervisory Board directors should not be self-interested in distorting results, we believe that it is equally reasonable to hold that it is in the best interest of companies and is good corporate governance for Supervisory Directors to have some stake in the success of the companies they serve. For many companies, particularly in the technology sector, option remuneration for directors is critical to attracting talented individuals to serve.

Dutch Corporate Governance Code provision	**Comment**
II.7.3 A Supervisory Board member shall invest only in listed investment funds or shall transfer the discretionary management of his securities portfolio to an independent third party by means of a written mandate.	We believe that this prohibition on owning listed shares may be unfairly burdensome and may discourage qualified and talented executives from serving on the Supervisory Boards of Dutch companies. We believe that the best way of deterring improper behavior related to securities ownership is through better education of directors of their responsibilities as well as the effective application of insider trading laws and internal corporate policies designed to monitor securities trading by executives, not prohibitions on personal investment discretion and market practice remuneration.
Supervisory Board term limit	
Best practice provision II.2.5: recommended maximum period for Supervisory Board service of twelve years	Many companies benefit from Supervisory Board service beyond this twelve-year maximum period, and may do so in the future. We believe companies may quite properly conclude that their long-term interests are well served by the experience and in-depth industry knowledge that comes from long-term board service.
Management Board Remuneration	
Principle I.2 Linkage of variable compensation to "previously-determined, measurable and influenceable goals"	Although we recognize the intent of this provision as well-meaning, we believe that a fixed, quantitative approach to remuneration could in some cases be counterproductive in that it could encourage the Management Board to manage toward short-term, pre-established targets rather than long-term interests. We believe that legislating a quantitative formula could discourage rational behavior, and ultimately be a disservice to both corporate governance and shareholder value, particularly in industries or markets that are volatile or under stress.
I.2.1 Options to acquire shares are a conditional remuneration component, and become unconditional only when the management board members have fulfilled *predetermined* performance criteria after a period of *at least three years* from the date on which the options are granted.	A mathematical approach to fixing predetermined performance criteria for Management Board options to vest and a three-year minimum vesting period may be inappropriate for certain companies, especially in the technology sector, where rapidly-evolving companies may need to change objectives quickly, rendering pre-determined criteria irrelevant, and where options make up a larger portion of total compensation. In these companies, pushing out minimum vesting periods to three years could in come cases dissuade talented executives from forming young Dutch companies if market practice elsewhere is different.

Dutch Corporate Governance Code provision	**Comment**
I.2.3 Shares acquired by management board members under a share plan shall at least be held by them until the termination of their employment	We believe this provision may have the unintended consequence of encouraging successful management to quit companies rather than continue, so that they can sell shares. We query whether this is necessarily a best practice.
I.2.5 The term of options shall be limited to a maximum of seven years and shall not be extended.	The maximum option term of seven years appears arbitrary, and certainly shorter than some international practices, which can extend for up to ten years in our experience.
I.2.8 In so far as a management board member wishes to invest in listed shares, he shall invest only in listed investment funds or transfer the free management of his securities portfolio to an independent third party by means of a written mandate	It is very common for personal savings to be held via direct equity investments in listed companies. We are concerned that a policy that would discourage equity ownership and control over personal investments could cause talented individuals to avoid serving on Management Boards of Dutch companies, or move to competitors organized in jurisdictions without such restrictions over their personal finances.
I.2.10 The maximum remuneration in the event of dismissal is one year's salary (the "fixed" part of the remuneration), irrespective of duration of the contract of employment	We believe that such a provision could be contrary to employment law in certain jurisdictions around the world, which may provide for greater benefits upon termination, especially in cases of long-term employment. In addition, because market practice elsewhere may be significantly less restrictive, this provision, especially when combined with other factors, could cause talented and experienced executives to avoid multinationals with Dutch parent companies.
I.2.9 The economic value of the variable remuneration compensation shall not exceed 50% of the total remuneration	In some countries and industries, the payment of large fixed salaries is not customary, and in these situations it may be important to provide greater variable compensation to attract talented management. While there may be valid reasons for imposing such a fixed vs. variable remuneration formula in The Netherlands, it could cause multinational companies incorporated in The Netherlands to become less attractive than their peer firms incorporated in other jurisdictions.